Supreme Court U.S.
FILED
FEB 24 '99
OFFICE OF THE CLERK

No. 981370

In The

Supreme Court of the United States

October Term, 1998

JORGE DOMINGO BENDEK, "et al."

ANTHONY WILLIAM CARRERAS,

Petitioners,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

JORGE DOMINGO BENDEK
#49177-004
ANTHONY WILLIAM CARRERAS
#49202-004
Pro Se
F.C.C. Coleman, Low B-3
P.O. Box 879
Coleman, Florida 33521-0879

6788

QUESTIONS PRESENTED FOR REVIEW

1. Did Court of Appeals render decision that is in direct conflict with decision of the U.S. Supreme Court and other Courts of Appeals, and has it departed from accepted and usual course of judicial proceedings, thereby calling for exercise of U.S. Supreme Court's supervisory power?

2. Can a waiver exist when NOT all parties agree? i.e., misgiving from government's counsel.

3. Did the district court err in suggesting and allowing an alternate juror to deliberate and return a verdict, thus having a jury composed of thirteen (13) persons?

4. Whether there can be a valid waiver of right not to have alternate jurors participate in deliberation when the Court initiates the Waiver?

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b) the following is a list of all parties to the proceedings:

Lawrence O. Anderson	U.S. Attorney's Office, prosecutor
Tony Axam	Trial counsel for codefendant Graham
Jorge Domingo Bendek	Codefendant/Petitioner
Mel Black	Appellate counsel for Carreras
Anthony William Carreras	Defendant/Petitioner
Robert H. Citronberg	Co-appellate counsel for Bendek
Ronald Gainor	Trial counsel for defendant Carreras
Sam Henry Graham	Co-defendant
Bruce Morris	Trial appellate counsel for Petitioner Bendek
Hon. G. Ernest Tidwell	U.S. District Judge
Seth Waxman	Solicitor General for the U. S. Justice Department

TABLE OF CONTENTS

Questions Presented i

List of Parties to the Proceedings..... ii

Table of Contents iii

Table of Citations iv

Opinions Below 1

Statement of Jurisdiction 1

Constitutional & Statutory Provisions Involved..... 1

Statement of the Case 2

Reason for Granting the Writ 19

I. This Supreme Court must put to rest these issues at hand, to preserve the integrity and to promote uniformity among the Circuits. The Petitioners willfully and respectfully pray that the United States Supreme Court flexes its muscles and grant Petitioners' Writ of Certiorari and cure the conflict plaguing the Circuits and restore the Petitioners fight for freedom. This new Millennium **"LET FREEDOM RING"**

Conclusion 22

Certificate of Service..... 23

Contents

Page

TABLE OF CITATIONS

Cases Cited:

Patton v. United States, 50 S.Ct. 253, 254 (1930) 3, 12, 13

Richardson v. Marsh, 107 S.Ct. 1702 (1987) 14

Sanchez v. United States, 782 F.2d 928, 931 (11th Cir. 1986) 13, 14

Turner v. Louisiana, 85 S.Ct. 546 (1965) 15

United States v. Acevedo, 141 F.3d 1421 (11th Cir. 1998). 20

United States v. Allison, 481 F.2d 468, 472, (5th Cir. 1973) 15, 17

United States v. Beasley, 464 F.2d 468 (10th Cir. 1972) 17

United States v. Hibdon, 204 F.2d 834 (6th Cir. 1953) 13

United States v. Olano, 113 S.Ct. 1770 (1993) 3, 9, 10, 15

United States v. Ottersburg, 76 F.3d 137, 139-40 (7th Cir. 1996)..... 10

United States v. Pachay, 711 F.2d 485 (2nd Cir. 1983) 14

United States v. Smedes, 760 F.2d 109 (5th Cir. 1988) 14

United States v. Watson, 669 F.2d 1374-130 (11th Cir. 1982) 16, 18

United States v. Young, 105 S.Ct. 1038, 1046 (1985) 9

Contents

STATUTES AND RULES:

FEDERAL RULES OF CRIMINAL PROCEDURE RULE 24(C)

FEDERAL RULE OF CRIMINAL PROCEDURE RULE 52(B)

APPENDIX

Appendix A - Opinion Of The United States Court Of Appeals reported in United States v. Bendek et al. Carreras 146 F 3d 1326 (11th Cir. 1998) published . . . . . .

Appendix B - U.S. Constitution Amendment VI. Rule F.R.C.P. 24(c)

Appendix C - The Petition For Rehearing And Suggestion For Rehearing *En Banc*. Denial of petition October 13, 1998, issued mandate October 21, 1998.

Appendix D - Actual transcript of court proceeding Waiver: Knowing or Voluntary? (Conflict Pgs. 816-818, Pgs. 828-830

Appendix E - Bendek's Judgment and Commitment Order

Appendix F - Carrera's Judgment and Commitment Order

The petitioners, Jorge Domingo Bendek and Anthony W. Carreras, pray that a writ of certiorari issue to review the *per curiam* opinion and judgment of the United States Court of Appeals for the Eleventh Circuit entered in the above entitled proceeding in July 23, 1998.

OPINION BELOW

A published *per curiam* (affirmed) opinion of the United States Court of Appeals for the Eleventh Circuit is reported as United States v. Bendek, 146 F 3d 1326 (11th Cir. 1997) (published) and appears in appendix "A" to this petition.

STATEMENT OF JURISDICTION

The Court of Appeals' Opinion in this matter was filed on July 23, 1998. A timely Petition for Rehearing was denied by the United States Court of Appeals on October 23, 1998, and a copy of the Order denying rehearing appears at Appendix "C". A timely notice for extension of time was filed with this Court on December 23, 1998. This case was presented to Justice Kennedy on January 11, 1999, who extended the time to and included February 26, 1999. Application No. A-553.

The jurisdiction of this court is invoked under 28 U.S.C. §1254(l)

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Amendment VI to the United States Constitution is set forth in Appendix B.

STATEMENT OF THE CASE

1. Material Facts

As developed at trial on a Thursday, May 17, 1996, which was the fourth day of trial, the court learned that a juror had an airline reservation to leave the city on May 18, a Saturday, and would not return until Tuesday, May 21. The court suggested that a "practical solution" might be to let all thirteen jurors retire and commence deliberations. The court opined that if a 13 member jury verdict was reached on Friday, there would be no problem, however, if a verdict was not reached, the remaining twelve jurors could return on Monday and deliberate. (R7-722). Later that day, the court asked for counsel's thoughts on its suggested solution. Government counsel opined that it would be a little more difficult on the government because there would be 13 jurors but counsel for all three defendants agreed to the suggestion. (R7-785-786). At the end of the day, the court stated its understanding that all parties agreed that when the case was submitted to the jury, it would be submitted to all 13 jurors and the verdict would be returned by all 13 jurors if the jury was able to return a verdict by Friday. If no verdict was returned on Friday, the one juror would be excused and 12 juror would continue deliberations on Monday. All counsel expressed agreement with this position, and each defendant was personally queried by the court and they also agreed to it. (R-816-817). The next day, the government expressed concern with the agreement and stated that it was not a good idea to proceed in this manner.

Introduction

At the suggestion of the trial court, an alternate juror deliberated and returned a verdict. Thus, 13 persons participated in the jury deliberations, and moreover, the verdict was rendered by 13 persons. The Constitution, the Rules of Criminal Procedure, and

precedence do not allow an alternate juror to participate or to have a jury of 13 persons. The United States Supreme Court held in *Patton v. United States*, 50 S.Ct. 253,254 (1930) that trial by jury means the jury should consist of 12 jurors, neither more nor less. Federal Rule of Criminal Procedure 24(c) provides that an alternate juror who does not replace a juror shall be discharged and not retire to deliberate.

In *United States v. Olano*, 113 S.Ct. 1770-1779 (1993), the government conceded, and the court assumed, without deciding, that a defendant cannot waive his right under Rule 24(c). The Supreme Court has assumed it would be improper for alternates to deliberate and participate because they are unauthorized persons participating in deliberations. Id. at 1770-79. Rule 24 (c) calls for them to be discharged and not participate. A defendant or any other party or judge can never agree to unauthorized persons or alternates participating in deliberations.

Even if the mandatory discharge language of Rule 24(c) could be distorted to allow the parties to consent to such a procedure, there is no valid consent or waiver in this case. In this case, the trial judge suggested and lobbied for the deviation from Rule 24(c). His influence voids the "consent." Moreover, the trial judge failed to advise the defendant of his right to have the alternate juror discharged, failed to make a searching inquiry with the defendant to ascertain if the consent was knowing and intelligent, and failed to make findings that the consent was knowing and intelligent.

The Record

THE COURT: ... Juror Steve Killean... says he has an airline reservation for Saturday May the 18th and return on Tuesday, May 21 to go to Florida to help my 80-year-old in-laws move ...

THE COURT: I have one possible solution. ... but my practical solution would be to let all 13 jurors retire if it goes to the jury around noon tomorrow, let all 13 jurors retire and commence deliberations. (R7:722)

Later on the trial judge renewed the discussion:

THE COURT: ... What about the juror, what about the suggested solution that I offered?

THE COURT: You are agreeing with my suggestion?

MR. AXAM: I'm agreeing with your suggestion, which was 13 deliberate initially.

MR. MORRIS: No objection.

MR GAINOR: No objection, your Honor. (R7:785-86)

THE COURT: As I indicated earlier in regard to juror Killean. [I]t's my understanding that we have agreed that when the case is submitted to the jury, that the case will be submitted to all 13 jurors and a legal verdict will be a verdict by all 13 jurors

THE COURT: Mr. Gainor, is what -- the procedure, I've just outlined agreeable to you?

MR. GAINOR: Yes Sir, it is.

THE COURT: Have you discussed it with your client?

MR. GAINOR: Yes, I have.

THE COURT: Mr. Carreras, you heard what I've just said?

MR. CARRERAS: Yes, Sir.

THE COURT: Do you understand what I I've just said?

MR. CARRERAS: Yes, Sir.

THE COURT: And that is agreeable to you?

MR. CARRERAS: Yes, Sir. (R7:816-818)

THE COURT: And Mr. Anderson, I understand it is agreeable to you?

MR. ANDERSON: Yes, Sir.

THE COURT: It's agreeable, but as we indicated I would appreciate you running it by some of the people in your office too, and see if they think there is any problem.

MR ANDERSON: I will judge.

The following is the actual court colloquy of the proceedings which will reflect undisputed, conflict and objection from the government not to proceed in this manner.

P R OC E E D I N G S
(MAY 17, 1996, OPEN COURT)

THE COURT: MR ANDERSON, DID YOU FIND ANYTHING YOU WANT ME TO LOOK AT?

MR. ANDERSON: NO, I DIDN'T, JUDGE.

HOWEVER, I DO WANT TO TALK TO THE COURT BRIEFLY ABOUT THE 13 JURORS.

THE COURT: OKAY.

MR. ANDERSON: I SPOKE WITH SOME OF MY COLLEAGUES LAST NIGHT, AND THERE IS A SECOND CIRCUIT CASE ALSO THAT SAID IT WASN'T ERROR, BUT IT'S NOT A GOOD IDEA AND YOU SHOULDN'T DO THAT.

AND SINCE THE RULE -- I THINK IT'S RULE 26 ALLOWS FOR US TO GO WITH 11 IF SOMETHING HAPPENS

TO A JUROR IN DELIBERATIONS, I THINK THE SAFEST COURSE OF ACTION WOULD BE TO DISMISS MR. KILLEEN. EVEN THOUGH I LIKE HIM AS A JUROR, I THINK THAT THAT MAY PREVENT ME FROM HAVING TO DEFEND THESE THREE GENTLEMEN LATER ON DOWN THE ROAD SHOULD THERE BE A CONVICTION IN THIS CASE IN 2255 MOTIONS. I THINK THAT MAY BE THE BEST WAY FOR US TO PROCEED, AND I WOULD ASK THE COURT TO DO THAT.

THE COURT: THE SECOND CIRCUIT CASE SAYS IT'S NOT A GOOD IDEA, BUT IT'S NOT ERROR?

MR. ANDERSON: IT DIDN'T SAY IT WAS ERROR, JUDGE. IT WAS A CASE WHERE I THINK THEY ALL AGREED TO DO IT, BUT THEY DIDN'T -- THEY FROWNED ON IT. AND THERE WAS -- CERT WAS DENIED -

LET ME DEFER TO MS. JENKINS, WHO FOUND A CASE AND READ IT TO ME.

WHAT WAS THE CERT ISSUE?

MS. JENKINS: JUSTICE STEVENS DISSENTED IN THE CERT DENIAL AND BASICALLY SAID THAT HE THOUGHT THERE WAS CONFLICTING AUTHORITY AMONG THE CIRCUITS ON THAT POINT AND THOUGHT THAT CERT SHOULD HAVE BEEN GRANTED.

THE SECOND CIRCUIT CASE THAT ADDRESSED THE ISSUE ITSELF, THEY HAD HAD A SIX-WEEK TRIAL AND APPARENTLY THE JUDGE DECIDED TO LET THE ALTERNATE GO AHEAD AND DELIBERATE BECAUSE HE HAD SAT THROUGH SUCH A LONG TRIAL. AND IN THAT CASE THEY DIDN'T ACTUALLY HAVE THE DEFENDANTS ON THE RECORD SAY THAT THEY AGREED, SO THAT WAS ONE PROBLEM, JUST THE ATTORNEYS AGREED. THEY DECIDED THAT IT WAS NOT A CONSTITUTIONAL

VIOLATION, THAT IT WAS NOT PREJUDICIAL BECAUSE HOW COULD IT BE PREJUDICIAL TO THE DEFENDANT IF THERE IS MORE JURORS THAN 12 -- IT SEEMS THE MORE THE BETTER, BUT THAT THEY THOUGHT IT WASN'T A GOOD IDEA BECAUSE THEY LIKE UNIFORMITY AMONG THE COURTS.

THE COURT: WELL, I AGREE IT'S NOT A GOOD IDEA. I DON'T LIKE THE IDEA.

I'LL DO IT THE WAY THE DEFENDANTS WANT TO DO IT. THE GOVERNMENT HAS A POSITION. I HAVE A POSITION. THE DEFENDANTS HAVE AGREED WITH MY POSITION.

YOU WANT TO CHANGE YOUR POSITION?

MR. MORRIS: NO, SIR, I AGREE WITH YOUR POSITION.

MR. AXAM: NO, YOUR HONOR -

MR. GAINOR: I'LL AGREE.

MR. AXAM: -- I'M NOT CHANGING FROM YOUR POSITION, YOUR HONOR.

THE COURT: OKAY.

WELL, OF COURSE, NOBODY EVER KNOWS WHAT AN APPELLATE COURT IS GOING TO DO ABOUT ANYTHING, BUT I WOULD THINK THAT IS AS SAFE AS WE COULD BE.

MR. AXAM: NO NEW AUTHORITY, YOUR HONOR, ON COUNT TWO AND WE RENEW OUR RULE 29 MOTION.

THE COURT: ANYTHING ELSE?

MR. ANDERSON, I'M INCLINED TO GRANT IT. ANYTHING ELSE YOU WANT TO SAY?

MR. ANDERSON: JUDGE, I DIDN'T HAVE ANYTHING ELSE TO --

THE COURT: ALL RIGHT. I SUSTAIN THE MOTION FOR

* * *

In spite of his earlier approval of the request for a 13person jury, the defendant now argues that such was "plain error," that his waiver was not valid, and that his rights were violated by an alternate participating in deliberations and reaching a verdict, and of the jury being composed of 13 members. The defendant argues that his rights under Rule 24 (c) cannot be waived and was not validly waived. In the instant case, the trial court committed error when it failed to dismiss the alternate juror and permitted the alternate juror to deliberate and decide the case along with the regular jurors. While the defendant did agree to the procedure, he was simply going along with the suggestion/request of the trial court.

Rule 24 (c) of the Federal Rules of Criminal Procedure provides in pertinent part:

> (c) Alternate Jurors. ... An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict.

In the instant case there is no question that. the court violated Rule 24 (c) when it failed to discharge the alternate juror and allowed him to participate in jury deliberations. The issue is whether it was

"plain error" which requires no objection by the defendant, and, moreover, whether the defendant did or did not exercise a valid, voluntary, and intelligent waiver of Rule 24(c).

In *United States v. Olano*, 113 S.Ct. 1770 (1993), two alternate jurors retired with the jury but were instructed by the court not to participate in the deliberations. The defendant in *Olano*, did not object to the procedure. In *Olano* the government conceded that a failure to comply with Rule 24(c) was "error" and also that the error was "plain." Id. at 1773, 1779. In *Olano* the defendant failed to show prejudice since there was no showing that the alternate jurors participated in deliberations or "chilled" the jury's deliberations. Id. at 1773. The Supreme Court said in *Olano* that prejudice cannot be presumed since it must be presumed that the alternate jurors followed the court's instructions not to participate in the jury's deliberations or proceedings. Id. at 1773-74. The mere unauthorized presence of the alternate jurors in the jury room during deliberations is not sufficient to "chill" or show prejudice. Id. at 1774. The meat of the coconut is whether the alternate jurors participated in the deliberations. In the instant case, the alternate juror was expressly instructed by the trial court to participate in the deliberations. Thus, there is a crucial distinction between *Olano* and the instant case.

In the instant case, the defendant also did not object to the procedure but expressly, on the record, agreed to the procedure. However, his rights under rule 24(c) were not explained to the defendant nor did he expressly waive Rule 24 (c) . Some errors, even without objection, constitute reversible error. Federal Rule of Criminal Procedure 52, 18 U.S.C.§ 833; *United States v. Young*, 105 S.Ct. 1038, 1046 (1985) . The record contains no explanation of why the defendant and the defense counsel agreed to this unorthodox procedure.

In *Olano* the Court discussed "forfeited, but reversible" errors and waiver of such rights.

> No procedural principle is more familiar to this Court than that a constitutional right or a right of any other sort, may be forfeited in criminal as well as civil cases by the failure to make timely assertion of the right ...
>
> . . . .
>
> The Court of Appeals should correct a plain forfeited error affecting substantial rights if the error "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."
>
> . . . .
>
> "[In] criminal cases, where the life, or as in this case the liberty, of the defendant is at stake, the courts of the United States in the exercise of a sound discretion, may notice (forfeited error]." ... (11'[T]he court, at its option, may notice a plain error not assigned or specified,").
>
> . . . .
>
> The presence of alternate jurors during jury deliberations is no doubt a deviation from Rule 24(c)

Olano, 113 S.Ct. at 1776, 1777, 1778, 1779.

In *United States v. Ottersburg*, 76 F.3d 137, 139-40 (7th Cir. 1996) a conviction was reversed when the verdict was returned by a 14-person jury. Just as in the case at bar, defense counsel had not objected to the court allowing the alternates to participate in deliberation. It should be noted that in *Ottersburg*, the defendant did not affirmatively agree on the record to the 14-person jury. *Ottersburg* does not clarify whether the court, prosecution or defendant suggested the 14-person jury. In the instant case, the court suggested the 13-person jury. The agreement by the defendant in the instant case should not diminish the impact of *Ottersburg*.

In *Ottersburg*, the Court stated:

> The record in this appeal affirmatively demonstrates that the alternate jurors were given no special instructions as to their limited role before they retired with the members of the jury to

deliberate on the verdict. After nine and a half hours of deliberation, the alternates emerged from the jury deliberations with the jury. ...

If, as the Supreme Court directed in *Olano*, we are to presume that the jurors and the alternates followed the instructions of the court, we must conclude that the jurors and the alternates deliberated as a body and, as the court required of them, delivered a unanimous verdict. It is clear, then, that the twelve jurors permitted to decide the facts of Mr. *Ottersburg* had substantive communications during their deliberations with persons, the alternates, who were not supposed to participate in those deliberations ....

... *Olano* indicates that the substantive participation of the alternates, once established, is sufficient to establish prejudice...

...The criminal conviction before us is based on the verdict of a jury composed of more than the number permitted by Rule 24 (c) . The record affirmatively shows that, by-direction of the district court, the alternate jurors acted as full members of the jury throughout the nine and a half hours of deliberations...

Waiver of Rights

In *Olano* the Court also discussed a waiver of rights by the defendant. The Court noted that the prosecution acknowledged that Rule 24(c) is "non-waivable.11 The Supreme Court agreed and assumed without deciding that Rule 24(c) is non-waivable:

Whereas forfeiture is the failure to make the timely assertion of a right, waiver is the "intentional relinquishment or abandonment of a known right." ... Whether a particular right is waivable; whether the defendant must participate personally in the waiver; whether certain procedures are required for

> waiver; and whether the defendant's choice must be particularly informed or voluntary, all depend on the right at stake ....
>
> The presence of alternate jurors during jury deliberations is no doubt a deviation from Rule 24(c). ... It is a separate question whether such deviation amounts to "error" when the defendant consents to the alternate's presence. The government supposes that there was indeed an "error" in this case, on the premises that Rule 24(c) is non-waivable, see Reply Brief for United States 9, n.4, and we assume without deciding that this premises is correct. The government also essentially concedes that the "error" was "plain." See id. at 8-9, and n.4.

Olano, 113 S.Ct. 1777, 1779. In *Olano*, the government advanced the premise that Rule 24(c) cannot be waived. The Supreme Court assumed without deciding that the premise of the government was correct, and petitioners have not found a case holding otherwise in the Supreme Court post-*Olano*. In this case, the prosecutor also explained that the deviation from the 12-person jury mandated by Rule 24(c) was a mistake and might be reversible error even if the defendant's went through a ritual of "waiving."

Even if the mandatory discharge language of Rule 24 (c) were to be read so as to allow consent to an alternate juror deliberating, the procedure for a consent would have to be scrupulous to avoid undue influence by the court and to assure the waiver was knowing, intelligent, and voluntary.

Patton v. United States, 281 U.S. 276, 50, S.Ct. 253, 263 (1930) involved the question of whether a defendant could waive his right to a 12-person jury and allow a jury of eleven jurors to decide the verdict. The Court cautioned that deviation from a 12person jury was a deviation from constitutional requirements and must be preceded by careful inquiry:

> [B]efore any waiver can become effective, the consent of government counsel and the sanction of the court must be

> had, in addition to the express and intelligent consent of the defendant. And the duty of the trial court in that regard is not to be discharged as a mere matter of rote, but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity.

Sanchez v. United States, 782 F.2d 928, 931 (11th Cir. 1986) indicated that the right to a unanimous Jury verdict in a federal criminal case may be waived when the defendant himself initiated the request for such a waiver. In the instant case, it should be recalled that the trial court, not the defendant, made the original suggestion of a 13-person jury.

In *Sanchez* the Court stated:

> [T]he Supreme Court has said that the phrase "trial by jury" embraces three elements: (1) that the jury should consist of twelve men, neither more nor less; ... *Patton v. United States*, 50 S.Ct. 253 at 254 (1930)
>
> . . . .
>
> The principal concern of opponents of a waiver provision is the potential for coercion by judges and prosecutors who would propose the waiver to the defendant and then be in a position to recommend or impose a harsh sentence upon a defendant who refuses. [Cites omitted] Such an argument is persuasive for finding that a defendant cannot waive the right where the suggestion comes from the government or the judge, ...
>
> . . . .
>
> ... In *Hibdon* [204 F.2d 834 (6th Cir. 1953)] the idea of waiver was initiated by the trial judge ... See *United States v.*

> *Smedes*, 760 F.2d 109 (6th Cir. 1985); *United States v. Pachay*, 711 F.2d 488 (2d Cir. 1983) . [Reversed on appeal when the idea of waiver was initiated by the trial court.]
>
> . . . .
>
> ... Before allowing the defendant to waive the right, the following criteria should be met: (1) the waiver should be initiated by the defendant, not the judge or prosecutor; ...

Sanchez 782 F.2d at 931,32,33,34.

The safeguards and protections for assuring that a waiver of unanimous jury should apply equally to waiver of the right to a 12-person jury. Both are fundamental elements of the right to a trial by jury. In this case, the inquiry whether the defendant agreed to go along with the judge's proposal falls far short of being the searching, detailed inquiry necessary to justify an informed, knowing, voluntary and intelligent waiver of such a valued right. Here, the trial judge did not explain to Carreras the right to have the alternates discharged and did not question him so as to determine if the waiver was knowing and voluntary.

Participation of Alternate Jurors During Deliberations

The instant case differs from *Olano* in a significant manner. In *Olano* the alternate jurors were instructed not to participate in deliberations, and thus the defendant in *Olano* did not show prejudice. The *Olano* court stated:

> In those instructions, the District Court specifically enjoined the jurors that "according to the law, the alternates must not participate in the deliberations," and reiterated, "we are going to ask that you not participate." Ibid. The Court of Appeals should not have supposed that this injunction was contravened. 11 [It is] the almost invariable assumption of the law that jurors follow their instructions." *Richardson v. Marsh*, 107

> S.Ct. 17 02 (198 7) . 11 [We] presum[e] that jurors, conscious of the gravity of their task, attend closely the particular language of the trial court's instruction in a criminal case and strive to understand, make sense of, and follow the instructions given them." ...

Olano, 113 S.Ct. at 1781.

In the instant case, the alternate juror, differing from *Olano*, was instructed to participate in the jury deliberations. (R8:934) It must be presumed that the alternate juror followed the court's instruction and fully participated in the jury deliberations. Also in the instant case, unlike *Olano*, the defendant has requested a remand to the trial court for an evidentiary hearing so that the record will show that the alternate juror followed the instructions of the court and participated in the jury deliberations. Id. at 1781. Such participation by an unauthorized alternate juror for the entire deliberations of three hours and 45 minutes would be prejudicial to the defendant. (R8:937)

As the Court stated in *Olano*:

> There may be cases where an intrusion should be presumed prejudicial, see, e.g. *Patton*, *supra*, 104 S.Ct. at 2888-2890; *Turner v. Louisiana*, 85 S.Ct. S46 (1965) ....
>
> ... [T]he presence of alternate jurors during the jury deliberations might prejudice a defendant in two different ways: either because the alternates actually participated in the deliberations, verbally or through "body language; 11 ... See *Watson*, *supra*, at 1391; *United States v. Allison*, 481 F.2d 468, 472 (CA5 1973) ....

In the instant case, all the jurors, including the alternate juror, were instructed by the trial court to discuss the case with one another and to commence their deliberations. (R8:934-37)

> THE COURT: Ladies and gentlemen, it is your duty as jurors to discuss this case with one another in an effort to each agreement, if you can do so. But each of you must decide the case for yourself, but only after full consideration of the evidence with the other members of the jury....(R8:934)

The jury deliberated for three hours and 45 minutes with the alternate juror participating in the deliberations. (R8:937)

Request for Evidentiary Hearing

In the instant case, the defendant has requested that the case be remanded to the trial court for an evidentiary hearing so that the record will be complete and will show that the alternate juror participated in the jury deliberations and thus, the defendant was prejudiced. This request was denied on September 18, 1997. In *Olano*, the Court stated:

> Respondents have made no specific showing that the alternate jurors in this case either participated in the jury's deliberations ... Respondents have never requested a hearing, and thus the record before us contains no direct evidence that the alternate jurors influenced the verdict.

United States v. Watson, 669 F.2d 1374, 1390 (11th Cir. 1982) dealt with an alternate juror being in the jury room for 35 minutes. The alternate juror had been elected foreman, but each juror individually responded that the presence of the alternate juror did not play any part in their deliberation or verdict. Some jurors indicated that the deliberations had just started when the alternate juror was removed from the jury room. Id. at 1390. After the excusal of the alternate, the jury was instructed to disregard any deliberations prior to the excusal of the alternate juror. The Watson court stated:

> The trial judge then put the following question to each juror: "Did the presence of Mr. Durden [the alternate] in the jury

room play any part of the verdict you just rendered?" ... The jurors were individually questioned out of the presence of the other jurors. All responded in the negative ....

When the trial judge failed to discharge the alternate juror, Rule 24(c), Federal Rules of Criminal Procedure, was violated. ... The rule is couched in mandatory language and "should be scrupulously followed." *United States v. Allison*, 481 F.2d 468 ....

Appellants ask us to treat this violation in the manner taken by the Tenth Circuit in *United States v. Beasley* 464 F.2d 468 (10th Cir. 1972) ....

. . . .

The Fifth Circuit indicated that it "might agree" under the facts of *Beasley* that reversal was required, but under circumstances where the alternate's presence was stipulated and the alternate was instructed not to participate, remand for an evidentiary hearing was a more appropriate course of action. Id. at 471-72. If the hearing revealed that the alternate had participated in the jury's deliberations or that in some other way the alternate's presence might have affected the jury's verdict, then reversal would be required.... Id. at 472.

. . . .

. . . The alternate's presence in the jury room after the jury retired to deliberate was undeniably in intrusion into the sanctity of the jury. If the alternate deliberated with the jury on the question of guilt, or if the jurors, independence of action was in some way restrained or affected by the alternate's presence, then reversal and a new trial could be mandatory. . . .

. . . Were this the only issue presented on appeal, we would remand with instruction to conduct a detailed evidentiary hearing to determine whether the alternate participated in any

> way in the deliberations; whether he took part in any votes of the jury; whether he indicated his views regarding any of the defendants in any way--orally or otherwise; . . . .
>
> In summary, failure to discharge the alternate when the jury retires is a violation of Rule 24. A mistrial or reversal is required if there is a reasonable possibility that the alternate in any manner affected the verdict...

Watson, 669 F.2d at 1389,90,91, 92.

2. Basis for Jurisdiction

The Court of jurisdiction arises pursuant to Rule 4 of the Federal Rule of Appellate procedure and 28 U.S.C. §1291, which confers jurisdiction from all final decision of the United States District Court, pursuant to Title 18, United States Code §3742.

The petitioner, Jorge Domingo Bendek, was indicted along with Anthony William Carreras and Sam Henry Graham Jr., in a five-count indictment which charged that from a date unknown but at least by October 3, 1989, until on or about December 31, 1994, the petitioner and others conspired to violate 21 U.S.C. §841 (a) (1), i.e. to knowingly and intentionally possess with intent to distribute a mixture containing cocaine in violation of 21 U.S.C. §846 and that on or about November 15, 1991, the petitioner did intentionally possess with the intent to distribute a quantity of cocaine in violation of 21 U.S.C. §841 (a) (1) and 18 U.S.C. §2. (R1-1) petitioners were found guilty of Count 1 and not guilty of Count 2.

Petitioner Bendek, was sentenced to 180 months of incarceration followed by 60 months of supervised release.

Petitioner Carreras, was sentenced to 168 months of incarceration to be followed by 60 months of supervised release. (R8:17,18). A timely notice of appeal was filed. (R2:97) petitioners is presently incarcerated at FCC Coleman, Florida.

The petitioners filed a timely notice of appeal and the Eleventh Circuit affirmed the conviction and sentence on July 23, 1998. Holding the petitioners had waived their right to a jury of 12, permitting an alternate to deliberate and render a verdict which affected petitioner's substantial right.

REASON FOR GRANTING THE WRIT

Steve Killean, the alternate juror not only participated in deliberations and rendered a verdict, but was also chosen to be foreman of the jury, foreman being the most influential person of the jury proceeding, and compounding the prejudice factor.

The fact that an alternate juror had weekend travel plans should have been to no import.

The court should not have played travel agent and should have heeded the repeated recommendation from the government counsel and simply excused the alternate. In fact, the true and actual colloquy reveals not only government's apprehension, but also the judge's forebodement as well. Then, the following colloquy took place:

> "Well, I have a position. The government has a position, and the defendants have a position". Meaning: The government's position was in conflict with his position and the defendant's position was imposed or procured by the judge without the consent or approval of the government, this true colloquy conflicts with there own Eleventh Circuit Courts.

However, the Court of Appeals merely ignored theirs and Supreme Court dicta in these cases, and mentioned in there opinion. The government had some misgivings, over this procedure. The meaning of misgivings in BURTON LEGAL THESAURUS, 2nd, edition, 1995, is "Misgivings, noun, objection, apprehension, hesitation, lack of confidence."

Therefore, this was a failed attempt to sugar coat their objection.

Furthermore, the simple fact that the Circuit Court chose not to opine. The validity of the waiver solicited by the trial judge, gives credence to our claims the waiver was not knowing or intelligently given.

Now, this Supreme Court must use its supervisory power to rescue itself from the conflict posed by the lower court. Is Rule 24 (c)

Federal Rule, Criminal Procedure non-waivable.?. Can a waiver be valid when the suggestion comes from the judge or prosecutor? Does the recommendation of the prosecutor not to go along with this highly unorthodox procedure invalidate the waiver? Was the waiver truly knowingly and voluntary? The answers to these questions have already been decided by this Supreme Court.

In a recent Eleventh Circuit opinion, in *United States v. Acevedo* , 140 F 3d 1426 (11th Cir. May 22, 1998), judge Tjoflat, Circuit Court judge held, that district court's clean slate instruction eliminated threat of prejudice to the defendant for Court's failure to release alternates prior to deliberations. The Court, however, implied that once the alternate participates in any way --- whether through words or gestures --- prejudice manifest (prejudice may arise either because the alternate actually participated in the deliberations verbally or through 'body language' or because the alternate's presence exerted a chilling effect on the regular jurors)"

Footnote 9 - Judge Tjoflat, notes that is impossible after a final verdict has been rendered., to ascertain the actual extent of the alternate's prejudicial influence.

Petitioner has demonstrated plain error which affected his substantial rights, that resulted in prejudice which fatally tainted the fairness, integrity, or public reputation of the proceeding..

This Petitioner can further demonstrate his contentions for granting the Writ, undisputed proof to the f acts at hand. The holdings of this United States Supreme Court and its Justices.

the Court of Appeals and remanded the case for further proceedings. In all opinion by O'CONNOR, J., joined by REHNQUIST, Ch. J., and SCALIA, KENNEDY, SOUTER, and THOMAS, JJ., it was held that, although the presence of the alternate jurors during jury deliberations was a deviation from the requirements of Rule 24(c), such a deviation was not a plain error which the Court of Appeals was authorized to correct under Rule 52(b)-even assuming that Rule 24(c) was non-waivable, so that a deviation from that rule was "error," and given the prosecutors' concession in the case at hand that the error was a "plain"-because the error was not one "affecting substantial rights" within the meaning of Rule 52(b), since (1) the presence of alternate jurors during jury deliberations is not the kind of error that affects substantial rights independent of its prejudicial impact; (2) the defendants, who bore the burden of showing prejudice, made no specific showing that the alternate jurors' presence in the case at hand prejudiced the defense; and (3) there was no reason to presume prejudice in the case at hand.

KENNEDY, J., concurred, expressing the view that (1) burden of proof analysis is useful in applying Rule 52(b) when the aggrieved party has raised the alleged error on appeal, although other rules may apply where an appellate court notices an error on its own initiative; (2) there are good reasons to suppose that the requirements of Rule 24(c) cannot be varied by court with or without the consent of the parties; and (3) Rule 52(b) does not permit a party to withhold an objection to the presence of alternate jurors during jury deliberations and then to demand automatic reversal.

STEVENS, J., joined by WHITE and BLACKMUN, JJ., dissented, expressing the view that (12 the District Court's failure to abide by Rule 24(c) violated the cardinal principle that jury deliberations shall remain private and secret; (2) this violation implicated substantial rights within the meaning of Rule 52; and (3)

although a reasonable judge could have concluded that the violation of Rule 24(c) in the case at hand did not call for reversal under Rule

52(b), the Court of Appeals did not abuse its broad discretion in deciding otherwise.

CONCLUSION

This Supreme Court must put to rest these issues at hand, to preserve the integrity and to promote uniformity among the Circuits.

The Petitioners willfully and respectfully pray that the United States Supreme Court flexes its supervisory muscles and grants Petitioner's Writ of Certiorari and cure the conflict plaguing the Circuits and restores the Petitioners fight for freedom.

This new Millennium **"LET FREEDOM RING"**

For the aforementioned reasons, the petition for certiorari should be granted.

By: _____

Anthony W Carreras, #49202-004
P.O Box 879, Coleman, Florida
33521-0879

By: _____

Jorge Domingo Bendek, #49177-004
P.O Box 879, Coleman, Florida
33521-0879

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing brief was served by first class mail 23rd day of February 1999 to: The Solicitor General, of the United States, Room 5614, Department of Justice, 950 Pennsylvania Avenue., N.W., Washington, DC 20530-0001.

FCC Coleman, Florida this 23rd day of February of 1999.

By: _____
Anthony W. Carreras
#49202-004 "LOW" Unit B-3
P.O. Box 879, Coleman, FL 33521-0879

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-9408

FILED
U.S.COURT OF APPEALS
ELEVENTH CIRCUIT
7/23/98
THOMAS G. KAHN
CLERK

D. C. Docket No. 1:95-CR-444-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

-v-

JORGE DOMINGO BENDEK,
ANTHONY WILLIAMCARRERAS,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

(July 23, 1998)

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

Jorge Domingo Bendek and Anthony William Carreras appeal the final judgments entered against them in this criminal action by the United States District Court for the Northern District of Georgia. From approximately 1989 until 1994, Bendek and Carreras were part of a cocaine

distribution conspiracy which operated primarily in Miami and Atlanta. In October 1995, they were indicted by a grand jury[1] in the Northern District of Georgia for conspiracy to possess with intent to distribute cocaine and the possession of cocaine. They were convicted on the conspiracy count but acquitted of the possession charge. Bendek was sentenced to 180 months in prison while Carreras received a sentence of 168 months. This appeal followed. While the appellants raise a number of issues, only one warrants discussion.[2]

I. FACTS

On Thursday, May 16, 1996, the fourth day of the trial, the court learned that one of the jurors had an airline reservation for a trip out of town on Saturday and was not scheduled to return until the following Tuesday. Since it was not clear that the jury would have returned a verdict by the end of the day Friday, the court suggested a solution which would accommodate the juror's trip:

> I have one possible solution. And I certainly haven't researched it, but my practical solution would be to let all 13 jurors retire if it goes to the jury around noon tomorrow, let all 13 jurors retire and commence deliberations. If they reach a 13-member jury verdict on Friday, there is no problem. If they don't, come back on Monday with 12 and let him go, as a practical solution.

---

[1] A third individual, Sam Henry Graham, Jr., was also indicted and tried but he was acquitted on all counts.

[2] Both defendants assign error on the district court refusal to permit defense counsel to use a writing to refresh a witness' recollection, permitting a government witness to testify about an unrelated theft of bread by Bendek and allowing the prosecutor to comment on the defendants' failure to call two witnesses. Bendek also contends that the evidence was insufficient to prove his guilt beyond a reasonable doubt, and Carreras argues that the district court erred in computing the amount of cocaine attributable to him. After a review of the record and applicable law pertaining thereto, we find no merit to these contentions and affirm the district court's judgment thereon without further comment.

Appendix A

> I don't know that there is any legal prohibition against that, but even if there is, if everybody agrees to it I don't guess there is any problem .

(R.7 at 723). Later in the day, the attorneys indicated to the judge that this procedure was acceptable to them.

After the Court had excused the jury for the night, the judge again raised the matter with the attorneys and the defendants. The following exchange then took place between the court, Bendek, Bendek's attorney, Mr. Bruce Morris, Carreras and Carreras' attorney, Mr. Ronald Gainor:

> Judge: As I indicated earlier, in regard to juror Killeen[3], it's my understanding that we have agreed that when the case is submitted to the jury, that the case will be submitted to all 13 jurors and a legal verdict will be a verdict by all 13 jurors. If the jury is able, if all 13 jurors are able to agree on a verdict tomorrow, there will be no problems, or at least insofar as the number. If they are not, Mr. Killeen will be excused at whatever time we recess on Friday, and on Monday we'll resume with only 12 jurors and that will be - all the par-ties and the defendant agree that a legal verdict may be rendered by those 12 jurors.
> Mr. Morris, is that agreeable to you?
> Mr. Morris: Yes, it is, your honor.
> Judge: Have you discussed it with your client? Mr. Morris.
> Mr. Morris: Yes, your honor.
> Judge: Mr. Bendek, you have heard what I've just said. Do you
> understand what I just said?
> Mr. Bendek: Yes, your honor.
> Judge: Is that agreeable to you? Mr. Bendek: Yes, your honor.

---

[3] The juror's name is spelled both Killean and Killeen in the trial transcript

> Judge: Mr. Gainor, is what - the procedure I've just outlined agreeable to you?
> Mr. Gainor: Yes, sir, it is.
> Judge: Have you discussed it with your client?
> Mr. Gainor: Yes, I have.
> Judge: Mr. Carreras, you heard what I've just said?
> Mr. Carreras: Yes, sir.
> Judge: Do you understand what I've just said?
> Mr. Carreras: Yes, sir.
> Judge: And that is agreeable to you?
> Mr. Carreras: Yes, sir.

(R.7 at 816-18). The following day, the attorney for the government expressed some *misgivings* about the arrangement. The district court replied, "I'll do it the way the defendants want to do it."

(R.8 at 830). He then asked defense counsel if they had changed their minds about the arrangement.

All three defense attorneys stated that they agreed with the thirteen-juror procedure. The case went to the jury around noon on Friday, and the thirteen-member jury returned a verdict around 5:00 P.M. that day.

II. DISCUSSION

The defendants contend that it was plain error for the district court to permit thirteen people to participate in the Jury's deliberations and verdict. They argue that they have a non-waivable right to a twelve-person jury. Even assuming that a defendant could consent to such a deviation, they maintain that there could be no valid waiver in this case because the district judge suggested and lobbied for the procedure.

The government takes the position that the defendants waived their right to a twelve-person jury. In its view, the defendants' agreeing to the procedure constituted a tactical decision intended to increase

their chances for an acquittal. Finally, the government claims that the defendants cannot demonstrate that the thirteen-person jury constituted plain error which affected their substantial rights.

Fed.R.Crim.P. 24(c) provides that alternate jurors should be dismissed once the regular panel retires to begin its deliberations. The Supreme Court of the United States has held that the mere presence of an alternate in the jury room is not inherently prejudicial to the defendant. *United States v. Olano*, 507 U.S. 725, 113 S.Ct. 1770, 1780-81, 123 L.Ed.2d 508 (1993). According, to the Court, the ultimate inquiry is whether the intrusion affected the jury's deliberations and consequently its verdict. Id. at 739, 113 S.Ct. at 1780. The Court reasoned that the presence of alternate jurors during jury deliberations might prejudice a defendant in one of two ways: either because the alternates actually participated in the deliberations or because the alternates' presence exerted a "chilling" effect on the regular jurors. Applying a Fed.R.Crim.P. 52(b) plain error analysis, the Court concluded that the court of appeals had no authority to correct the error because it did not affect the defendants' substantial rights.

This court has recently reaffirmed the holding of the former Fifth Circuit Court of Appeals in *United States v. Allison*, 481 F.2d 468 (5'" Cir. 1973),[4] rejecting a per see rule for violations of Rule 24(c). According to the court, a mistrial war-ranted only there a reasonable possibility that the district Court's violation of Rule 24(c) actually prejudiced the defendant by tainting the jury s final verdict. *United States v. Acevedo*, 141 F.3d 1421, 1424 (11" Cir. 1998). In that case, the district court had initially permitted the two alternate jurors to retire and participate in the deliberations with the "regular" jurors. On realizing the error, the district court removed the alternates and instructed the twelve regular jurors to deliberate again.

---

[4] Decisions of the former Fifth Circuit are binding on this court. Bonner v. City of Prichard, 661 F.2d 1206 (11th Cir. 1991).

This court held that the Rule 24(c) error was harmless and affirmed *Acevedo*'s convictions.

In this case, since the defendants did not object to the deviation in jury size but rather embraced it affirmatively, they can prevail only by establishing that the use of a jury composed of thirteen persons constituted plain error. It does not appear that they can make such a showing. Under Rule 52(b), "[p]lain errors or defects affecting substantial rights may be noticed although they were not brought to the attention of the court." The rule permits an appellate court to correct a forfeited-but-reversible error. There are several limitations placed on appellate authority under such circumstances. There must be error; the error must be plain; and the plain error must affect substantial rights. *Olano*, 507 U.S. at 732-34, 113 S.Ct. at 1777-78. There is a further limitation, however. A court of appeals may correct a plain, forfeited error affecting substantial rights only "lift the error 'seriously affect[s] the fairness, integrity or public reputation of judicial proceedings." Id. at 736, 113 S.Ct. at 1779 (quoting United *States v. Atkinson*, 297 U.S. 157, 160, 56 S.Ct. 391, 392, 80L.Ed.555(1936)). Accordingly, a plain error affecting substantial rights does not, without more, satisfy this standard. Id. at 737, 113 S.Ct. at 1779.

Assuming, without deciding, that the district court's permission for thirteen jurors to deliberate and return a verdict in this case constitutes plain error which affected the defendants' substantial rights, they fail still to state a claim for relief pursuant to Rule 52(b) because they can not show that the jury size affected the fairness, integrity or public reputation of the proceeding. The procedure followed by the district court in this case, while perhaps unorthodox, was advanced with the best of intentions and assented to by the defendants and their attorneys in open court. No reasonable person could believe that the fairness or integrity of the proceeding had been compromised by the district court's action.

The judgment of the district court is AFFIRMED.

Appendix B

AMENDMENT VI-JURY TRIAL FOR CRIMES, AND PROCEDURAL RIGHTS

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

Rule 24

RULES OF CRIMINAL PROCEDURE

fine or both, each side is entitled to 3 peremptory challenges. If there is more than one defendant, the court may allow the defendants additional peremptory challenges and permit them to be exercised separately or jointly.

(c) Alternate Jurors. The court may direct that not more than 6 jurors in addition to the regular jury be called and impanelled to sit as alternate jurors Alternate jurors in the order in which they are called shall replace jurors who, prior to the time the jury retires to consider its verdict, become or are found to be unable or disqualified to perform their duties. Alternate jurors shall be drawn in the same manner, shall have the same qualifications, shall be subject to the same examination and challenges, shall take the same oath and shall have the same functions, powers, facilities and privileges as the regular jurors. An alternate juror who does not replace a regular juror shall be discharged after the jury retires to consider its verdict. Each side is entitled to 1 peremptory challenge in addition to those otherwise allowed by law if 1 or 2 alternate jurors are to be impanelled, 2 peremptory challenges if 3 or 4 alternate jurors are to be impanelled, and 3 peremptory challenges if 5 or 6 alternate jurors are to be impanelled. The additional peremptory challenges may be used against an alternate juror only, and the other peremptory challenges allowed by these rules may not be used against an alternate juror.

Appendix C

UNITED STATES COURT OF APPEALS

ELEVENTH CIRCUIT

CASE NO. 96-9408

****

UNITED STATES OF AMERICA

Plaintiff/Appellee

vs.

ANTHONY WILLIAM CARRERAS

Defendant/Appellant

****

On Appeal From The United States District Court

Northern District of Georgia

PETITION FOR REHEARING AND SUGGESTION FOR RE HEARING EN BANC

MEL BLACK
2937 S.W. 27th Avenue, Suite 202
Miami, Florida 33133
(305) 443-1600 / Fax 445-9666
Florida Bar No. 117489

Appendix C

Docket 96-9408

United States v. Anthony Carreras

CERTIFICATE OF INTERESTED PERSONS

AND CORPORATE DISCLOSURE STATEMENT

These representations are made in order that the judges of this Court may evaluate possible disqualification or recusal pursuant to the Rules of the Eleventh Circuit Court of Appeals.

Lawrence 0. Anderson, U.S. Attorney's Office, trial prosecutor

Tony Axam, trial counsel for co.-defendant Graham

Jorge Domingo Bendek, co-defendant

Mel Black, appellate Counsel for Carreras

Anthony William Carreras, defendant/appellant

Robert H. Citronberg, co-appellate counsel for Bendek

Ronald Gainor, trial counsel for defendant/appellant Carreras

Sam Henry Graham, co-defendant

Bruce Morris, trial and appellate counsel for co-defendant Bendek

Honorable G. Ernest Tidwell, United States District Judge

Appendix C

CERTIFICATE OF COUNSEL FOR EN BANC CONSIDERATION

I express a belief, based on a reasoned and studied professional judgment, that this appeal involves one or more questions of exceptional importance:

WHETHER THERE CAN BE A VALID WAIVER OF RIGHT NOT TO HAVE ALTERNATE JURORS PARTICIPATE IN DELIBERATION WHEN THE COURT INITIATES THE WAIVER?

By: s/ MEL BLACK
Attorney of Record for
ANTHONY CARRERAS, Appellant

Appendix C

TABLE OF CONTENTS

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT 1

CERTIFICATE OF COUNSEL FOR EN BANC CONSIDERATION 2

TABLE OF CONTENTS AND CITATIONS 3

STATEMENT OF THE ISSUES 6

STATEMENT OF THE CASE 5

STATEMENT OF THE FACTS 7

ARGUMENT 9

CONCLUSION 12

CERTIFICATE OF SERVICE 13

Appendix C

TABLE OF CITATIONS

Patton v. United States, 281 U.S. 276, 312 S.Ct. 253, 263 (1938) 9-10

Sanchez v. United States, 782 F.2d 928, 931 (11 th Cir. 1986) 10-11

Appendix C

STATEMENT OF THE ISSUE

WHETHER THERE CAN BE A VALID WAIVER OF RIGHT NOT TO HAVE ALTERNATE JURORS PARTICIPATE IN DELIBERATION WHEN THE COURT INITIATES THE WAIVER?

Appendix C

STATEMENT OF THE CASE

Course of Proceedings

The appellant, Anthony W. Carreras, was indicted along with Jorge Domingo Bendek and Sam Henry Graham, Jr., in a five-count indictment which charged that from a date unknown but at least by October 3, 1989, until on or about December 21, 1994, the appellant and others conspired to violate 21 U.S.C. 841(a)(1), i.e., to knowingly and intentionally possess with intent to distribute a mixture containing cocaine in violation of 21 U.S.C. 846 and that on or about November 15, 1991, the appellant did intentionally possess with tile intent to distribute a quantity of cocaine in violation of 21 U.S.C 841(a)(1) and 18 U.S.C. 2. (R1-1) Appellant was found guilty of Count I and not guilty Of Count 2.

Appellant was sentenced to 168 months incarceration to be followed by 60 months of supervised release. (R8:17,18) A timely notice of appeal was filed. (R2:97) Appellant is presently incarcerated in FCI Coleman, Florida.. On July 23, 1998, the Court of Appeals panel issued its opinion which is the subject of this Petition for Rehearing and Suggestion for Rehearing En Banc.

Appendix C

STATEMENT OF FACTS

Near the close of the trial, one of the jurors advised the Court of a possible personal problem if deliberations extended to the weekend. The following proceedings took place:

> THE COURT: ... Juror Steve Killean, ... says he has an airline reservation for Saturday May the 18th and return on Tuesday 5-21 to go to Florida to help my 80-year-old in-laws move;...
>
> . . . .
>
> THE COURT: I have one possible solution. ... but my practical solution would be to let all 13 jurors retire if it goes to the jury around noon tomorrow, **let all 13 jurors retire and commence deliberations**. (R7:722)

Later on the trial judge renewed the discussion:

> THE COURT: ... What about the juror, **what about the suggested solution that I offered? ...**
>
> THE COURT: **You are agreeing with my suggestion?**
>
> MR. AXAM: I'm agreeing, with your suggestion, which was 13 deliberate initially.
>
> MR. MORRIS: No objection.
>
> MR. GAINOR: No objection, your Honor. (R7:785-86)
>
> ....
>
> THE COURT: ...[I]t's my understanding that we have agreed that when the Case is Submitted to the jury, **that the case will be submitted to all 13 jurors and a legal verdict will be a verdict by all 13 jurors..**

Appendix C

...

THE COURT: Mr. Gainor, is what -- the procedure I've just outlined agreeable to You?

MR. GAINOR: Yes, sir, it is.

THE COURT: Have you discussed it with your client?

MR. GAINOR: Yes, I have.

THE COURT: Mr. Carreras, you heard what I've just said?

MR. CARRERAS: Yes, sir.

THE COURT: Do you understand what I've just said?

MR. CARRERAS: Yes, sir.

THE COURT: And that is agreeable to you?

MR. CARRERAS: Yes, sir. (R7:816-818)

The following day, the government indicated that a 13-person jury was "not a good idea" and should not be done. The court inquired of defense Counsel who indicated assent to **the court's original suggestion of a 13-person jury.**

THE COURT: ... **The government has a position. I have a position. The defendants have agreed with my position.**

....

MR. GAINOR: I'll agree.

MR. AXAM: --I'm not changing from your position, your Honor. (R8:828-830)

Appendix C

ARGUMENT

In the opinion dated July 23, 1998, the panel did not address or decide the defendant's contention that a waiver of a defendant's rights not to have alternates deliberate is not valid if such waiver is initiated by the court. The panel did note the defendant's position questioning the validity of a waiver solicited by the trial judge: "Even assuming that a defendant could consent to such a deviation, they maintain that there Could be no valid waiver in this case because the district judge suggested and lobbied for the procedure." (Opinion, at 4)

A careful review of the panel opinion reveals that this issue was never decided. Even if the mandatory discharge language of Rule 24(c) were to be read so as to allow consent to an alternate juror deliberating, the procedure for a consent would have to be scrupulous to avoid undue influence by the court and to assure the waiver was knowing, intelligent, and voluntary.

Patton v. United States, 281 U.S. 276, 312 S.Ct. 253, 263 (1938) involved the question of whether a defendant could waive his right to a 12-person jury and allow a jury of eleven jurors to decide the verdict. The Court cautioned that deviation from a 12-person jury was a deviation from constitutional requirements and must be preceded by careful inquiry:

> [B]cf6re any waiver can become effective, the consent of government counsel and the sanction of the court must be had, in addition to the **express and intelligent** consent of the defendant. And the duty of the trial court in that regard is **not to be discharged as a mere matter of rote**, but With Sound and advised discretion, with all eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and **with a caution increasing in degree as the offenses dealt with** increase **in gravity.**

Sanchez v. United States, 782 F.2d 928, 93 1 (11 tli Cir. 1986) indicated that the right to a unanimous jury verdict in a federal

criminal case **may be waived when the defendant himself initiated the request for such a waiver**. In the instant case, it should be recalled that the trial Court, not the defendant., made the original Suggestion of a 13-person jury.

In *Sanchez* the Court stated:

> [T]he Supreme Court has said that the phrase "trial by jury" embraces three elements: (I) that the jury Should consist of twelve men, neither more nor less; ... *Patton v. United States*, 50 S.Ct. 253 at 254 (1938)
>
> ....
>
> The principal concern of opponents of a waiver provision is the potential for coercion by judges and prosecutors who would propose the waiver to the defendant and then be in a position to recommend or impose a harsh sentence upon a defendant who refuses. [Cites omitted] **Such an argument is persuasive for finding that a defendant cannot waive the right where the suggestion conies from the Government or the judge,...**
>
> ....
>
> ... In *Hibdon* [204 F.2d 834 (6th Cir. 1953)] the idea of waiver was initiated by the trial judge ... See *United States v. Smedes*, 760 F.2d 109 (6th Cir. 1985); *United States v. Pachay*, 711 F.2d 488 (2d Cir. 1983). [Reversed on appeal when the idea of waiver was initiated by the trial court.]
>
> **... Before allowing the defendant to waive the right, the following criteria should be met: (1) the waiver should be initiated by the defendant, not the judge or prosecutor; ...**

Sanchez, 782 F.2d at 931,32,33,34.

The safeguards and protections for assuring that a waiver of unanimous jury should apply equally to waiver of the right to a 12-

person jury. Both are fundamental elements of the right to a trial by jury. In this case, the inquiry whether the defendant agreed to go along with the judge's proposal falls far short of being the searching, detailed inquiry necessary to justify all informed, knowing, voluntary and intelligent waiver of such a valued right. Here, the trial judge did not explain to Carreras the right to have the alternates discharged and did not question him so as to determine if tile waiver was knowing and voluntary.

If the panel opinion had considered and decided the issue in favor of the defendant, then the action of the trial court would have invalidated the waiver and cured the lack of objection. This would have mooted the "plain error" analysis in the opinion.

Alternatively, even if considered under plain error analysis, such action by a trial judge in initiating and lobbying for such a waiver would constitute plain error.

CONCLUSION

In conclusion, the panel decision passes on a question of extreme importance. The panel opinion should be withdrawn, and the defendant's conviction should be reversed

Respectfully submitted,

By: s/ MEL BLACK
2937 S.W. 27th Avenue
Suite 202
Miami, Florida 33133
(305) 443-1600 / Fax 445-9666
Florida Bar No. 117489

Appendix C

CERTIFICATE OF SERVICE

I Hereby Certify that a copy of the foregoing was mailed to Larry Anderson, Assistant U. S. Attorney, U.S. Attorney's Office, #1800 U.S. Courthouse, 75 Spring Street, S.W., Atlanta, GA 30335, on this 12" day of August, 1998.

By: s/ MEL BLACK

Appendix C

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

No. 96-9408

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JORGE DOMINGO BENDEK;
ANTHONY WILLIAM CARRERAS,

Defendants-Appellants.

On Appeal from the United States District Court for the Northern District of Georgia

---

BEFORE: CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

PER CURIAM:

The petition for rehearing filed by the Appellant, Anthony William Carreras, is DENIED.

The petition for rehearing filed by the Appellant, Jorge Domingo Bendek, is DENIED.

ENTERED FOR THE COURT:

/s/ Albert J. Henderson

SENIOR UNITED STATES CIRCUIT JUDGE

ORD-41

Appendix C

United States Court of Appeals

FOR THE ELEVENTH CIRCUIT

FILE
U.S. COURT OF APPEALS
No. 96-9408 ELEVENTH CIRCUIT

JUL 2 3 1998
THOMAS K. KAHN
CLERK

District Court No. 1:95-CR-444-1

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

versus

JORGE DOMINGO BENDEK,
ANTHONY WILLIAM CARRERAS,

Defendants-Appellants.

Appeals from the United States District Court
for the Northern District of Georgia

Before CARNES and HULL, Circuit Judges, and HENDERSON, Senior Circuit Judge.

JUDGMENT

These causes came to be heard on the transcript of the record from the United States District Court for the Northern District of Georgia, and were argued by counsel;

UPON CONSIDERATION WHEREOF, it is now hereby ordered and adjudged by this Court that the judgments of convictions of the said District Court and the sentences imposed in these causes be and the same are hereby AFFIRMED.

Entered: July 23, 1998
For the Court: Thomas K. Kahn,
By: s/ Matt Davidson, Deputy Clerk

ISSUED AS MANDATE: OCT 2 1

Appendix C

United States Court of Appeals
Eleventh Circuit
56 Forsyth Street, N.W.
Atlanta, Georgia 30303

October 21, 1998

Luther D. Thomas
Clerk, U.S. District Court
2211 U.S. Courthouse, 75 Spring St., SW
Atlanta, GA 30335

RE: 96-9408 USA v. Bendek
DC DKT NO.: 95-00444 1-CR-1-GET

The enclosed certified copy of the judgment and a copy of this court's opinion are hereby issued as the mandate of this court.

Also enclosed are the following:

Original Exhibits, consisting of one envelope and three sealed envelopes original record on appeal or review, consisting of ten volumes

Please acknowledge receipt on the enclosed copy of this letter.

Sincerely,

s/ THOMAS K. KAHN, Clerk

Reply To: Anne Shadinger 404-335-6113

Encl.

MDT-1
(2/92)

TODAY. AT THIS TIME I'M GOING TO EXCUSE YOU UNTIL 9:00 O'CLOCK
IN THE MORNING, A LITTLE BIT EARLIER. WE'LL TRY TO GET STARTED
AT 9:00 O'CLOCK WITH THE ARGUMENT, AND THEN THE CHARGE OF THE
COURT. AND THEN THE CASE WILL BE SUBMITTED TO YOU FOR YOUR
DELIBERATIONS AND DECISION.
AT THIS TIME YOU MAY BE EXCUSED UNTIL 9:00 A.M.
IN THE MORNING. THANK YOU AND GOOD EVENING.
(JURY OUT)
THE COURT: ALL RIGHT.
EACH DEFENDANT, EACH AND ALL DEFENDANTS RENEW EACH
AND ALL THE MOTIONS PREVIOUSLY MADE, LET THE RECORD SO REFLECT,
AND EACH AND ALL OF THE MOTIONS ARE AGAIN OVERRULED AND DENIED
WITH THE EXCEPTION OF - -
MR. ANDERSON: COUNT TWO, JUDGE.
THE COURT: -- COUNT TWO, WHICH I'M DEFERRING UNTIL
IN THE MORNING.
AND MR. AXAM, DON'T YOU LET ME FORGET TO RULE ON THAT
BEFORE WE START THE ARGUMENT IN THE MORNING.
MR. AXAM: I WILL NOT, YOUR HONOR.
THE COURT: AS I INDICATED EARLIER, IN REGARD TO
JUROR KILLEEN, IT'S MY UNDERSTANDING THAT WE HAVE AGREED THAT
WHEN THE CASE IS SUBMITTED TO THE JURY, THAT THE CASE WILL BE
SUBMITTED TO ALL 13 JURORS AND A LEGAL VERDICT WILL BE A

Appendix D

24 VERDICT BY ALL 13 JURORS. IF THE JURY IS ABLE, IF ALL 13
25 JURORS ARE ABLE TO AGREE ON A VERDICT TOMORROW, THERE WILL BE

PAT M. TANNER,--OFFICIAL COURT REPORTER

817

1 NO PROBLEMS, OR AT LEAST INSOFAR AS THE NUMBER. IF THEY ARE
2 NOT, MR. KILLEEN WILL BE EXCUSED AT WHATEVER TIME WE RECESS ON
3 FRIDAY, AND ON MONDAY WE'LL RESUME WITH ONLY 12 JURORS AND THAT
4 WILL BE -- ALL THE PARTIES AND THE DEFENDANT AGREE THAT A LEGAL
5 VERDICT MAY BE RENDERED BY THOSE 12 JURORS.
6 MR. MORRIS, IS THAT AGREEABLE TO YOU?
7 MR. MORRIS: YES, IT IS, YOUR HONOR.
8 THE COURT: HAVE YOU DISCUSSED IT WITH YOUR CLIENT?
9 MR. MORRIS.
10 MR. MORRIS: YES, YOUR HONOR.
11 THE COURT: MR. BENDEK, YOU HAVE HEARD WHAT I'VE
12 JUST SAID. DO YOU UNDERSTAND WHAT I JUST SAID?
13 MR. BENDEK: YES, YOUR HONOR.
14 THE COURT: IS THAT AGREEABLE TO YOU?
15 MR. BENDEK: YES, YOUR HONOR.
16 THE COURT: MR. GAINOR, IS WHAT -- THE PROCEDURE
17 I'VE JUST OUTLINED AGREEABLE TO YOU?
18 MR. GAINOR: YES, SIR, IT IS.

Appendix D

19 THE COURT: HAVE YOU DISCUSSED IT WITH YOUR CLIENT?
20 MR. GAINOR: YES, I HAVE.
21 THE COURT: MR. CARRERAS, YOU HEARD WHAT I'VE JUST
22 SAID?
23 MR. CARRERAS: YES, SIR.
24 THE COURT: DO YOU UNDERSTAND WHAT I'VE JUST SAID?
25 MR. CARRERAS: YES, SIR.

PAT M. 'TANNER, OFFICIAL COURT REPORTER

818

1 THE COURT: AND THAT IS AGREEABLE TO YOU?
2 MR. CARRERAS: YES, SIR.
3 THE COURT: MR. AXAM, IS WHAT -- THE PROCEDURE I
4 HAVE JUST OUTLINED AGREEABLE TO YOU?
5 MR. AXAM: IT IS.
6 THE COURT: HAVE YOU DISCUSSED IT WITH YOUR CLIENT?
7 MR. AXAM: I HAVE.
8 THE COURT: MR. GRAHAM, YOU UNDERSTAND WHAT I'VE
9 JUST SAID?
10 MR. GRAHAM: YES, I DO, YOUR HONOR.
11 THE COURT: IS WHAT I'VE JUST SAID AGREEABLE TO YOU?
12 MR. GRAHAM: YES.
13 THE COURT: AND MR. ANDERSON, I UNDERSTAND IT'S
14 AGREEABLE TO YOU?

Appendix D

MR. ANDERSON: YES, SIR.
THE COURT: IT'S AGREEABLE.
BUT AS WE INDICATED, I WOULD APPRECIATE YOU RUNNING
IT BY SOME OF THE PEOPLE IN YOUR OFFICE TOO AND SEE IF THEY
THINK THERE IS ANY PROBLEM.
MR. ANDERSON: I WILL, JUDGE.
ALL RIGHT.
THE REQUESTS TO CHARGE.
I WILL GIVE ALL THE CUSTOMARY CHARGES INCLUDING
IMPEACHMENT, CO-CONSPIRATORS, THE LANGUAGE WHAT THEY MUST BE
CONSIDERED WITH MORE CAUTION, POSSESSION, A CHARGE ON 841, 846,

PAT M. TANNER, OFFICIAL COURT REPORTER

828

PROCEEDINGS
(MAY 17, 1996, OPEN COURT)
THE COURT: PLEASE BE SEATED.
ALL RIGHT.
MR. MORRIS, YOU GOT ME SOMETHING YOU WANT ME TO LOOK
AT?
MR. MORRIS: NO, SIR, I REREAD WHAT I BELIEVE YOUR
HONOR IS GOING TO GIVE AND TALKED TO MR. AXAM ABOUT WHAT HE
SPOKE WITH YOU ABOUT. I THINK IT'S COVERED.

Appendix D

10 THE COURT: MR. ANDERSON, DID YOU FIND ANYTHING YOU
11 WANT ME TO LOOK AT?
12 MR. ANDERSON: NO, I DIDN'T, JUDGE.
13 HOWEVER, I DO WANT TO TALK TO THE COURT BRIEFLY ABOUT
14 THE 13 JURORS.
15 THE COURT: OKAY.
16 MR. ANDERSON: I SPOKE WITH SOME OF MY COLLEAGUES
17 LAST NIGHT, AND THERE IS A SECOND CIRCUIT CASE ALSO THAT SAID
18 IT WASN'T ERROR, BUT IT'S NOT A GOOD IDEA AND YOU SHOULDN'T DO
19 THAT.
20 AND SINCE THE RULE -- I THINK IT'S RULE 26 ALLOWS FOR
21 US TO GO WITH 11 IF SOMETHING HAPPENS TO A JUROR IN
22 DELIBERATIONS, I THINK THE SAFEST COURSE OF ACTION WOULD BE TO
23 DISMISS MR. KILLEEN. EVEN THOUGH I LIKE HIM AS A JUROR, I
24 THINK THAT THAT MAY PREVENT ME FROM HAVING TO DEFEND THESE
25 THREE GENTLEMEN LATER ON DOWN THE ROAD SHOULD THERE BE A

PAT M. TANNER, OFFICIAL COURT REPORTER

829

1 CONVICTION IN THIS CASE IN 2255 MOTIONS. I THINK THAT MAY BE
2 THE BEST WAY FOR US TO PROCEED, AND I WOULD ASK THE COURT TO DO
3 THAT.

Appendix D

THE COURT: THE SECOND CIRCUIT CASE SAYS IT'S NOT A GOOD IDEA, BUT IT'S NOT ERROR?

MR. ANDERSON: IT DIDN'T SAY IT WAS ERROR, JUDGE.

IT WAS A CASE WHERE I THINK THEY ALL AGREED TO DO IT,

BUT THEY DIDN'T -- THEY FROWNED ON IT. AND THERE WAS -- CERT

WAS DENIED -

LET ME DEFER TO MS. JENKINS, WHO FOUND A CASE AND

READ IT TO ME.

WHAT WAS THE CERT ISSUE?

MS. JENKINS: JUSTICE STEVENS DISSENTED IN THE CERT DENIAL AND BASICALLY SAID THAT HE THOUGHT THERE WAS CONFLICTING AUTHORITY AMONG THE CIRCUITS ON THAT POINT AND THOUGHT THAT CERT SHOULD HAVE BEEN GRANTED.

THE SECOND CIRCUIT CASE THAT ADDRESSED THE ISSUE

ITSELF, THEY HAD HAD A SIX-WEEK TRIAL AND APPARENTLY THE JUDGE

DECIDED TO LET THE ALTERNATE GO AHEAD AND DELIBERATE BECAUSE HE

HAD SAT THROUGH SUCH A LONG TRIAL. AND IN THAT CASE THEY

DIDN'T ACTUALLY HAVE THE DEFENDANTS ON THE RECORD SAY THAT THEY

AGREED, SO THAT WAS ONE PROBLEM, JUST THE ATTORNEYS AGREED.

THEY DECIDED THAT IT WAS NOT A CONSTITUTIONAL VIOLATION, THAT

Appendix D

IT WAS NOT PREJUDICIAL BECAUSE HOW COULD IT BE PREJUDICIAL TO
THE DEFENDANT IF THERE IS MORE JURORS THAN 12 -- IT SEEMS THE

PAT M. TANNER, OFFICIAL COURT REPORTER

830

MORE THE BETTER, BUT THAT THEY THOUGHT IT WASN'T A GOOD IDEA
BECAUSE THEY LIKE UNIFORMITY AMONG THE COURTS.
THE COURT: WELL, I AGREE IT'S NOT A GOOD IDEA. I
DON'T LIKE THE IDEA.
I'LL DO IT THE WAY THE DEFENDANTS WANT TO DO IT.
THE GOVERNMENT HAS A POSITION. I HAVE A POSITION. THE DEFENDANTS
HAVE AGREED WITH MY POSITION.
YOU WANT TO CHANGE YOUR POSITION?
MR. MORRIS: NO, SIR, I AGREE WITH YOUR POSITION.
MR.AXAM: NO, YOUR HONOR --
MR. GAINOR: I'LL AGREE.
MR. AXAM: -- I'M NOT CHANGING FROM YOUR POSITION,
YOUR HONOR.
THE COURT: OKAY.
WELL, OF COURSE, NOBODY EVER KNOWS WHAT AN APPELLATE
COURT IS GOING TO DO ABOUT ANYTHING, BUT I WOULD THINK THAT IS
AS SAFE AS WE COULD BE.

Appendix D

MR. AXAM: NO NEW AUTHORITY, YOUR HONOR, ON COUNT TWO AND WE RENEW OUR RULE 29 MOTION.

THE COURT: ANYTHING ELSE?

MR. ANDERSON, I'M INCLINED TO GRANT IT. ANYTHING ELSE YOU WANT TO SAY?

MR. ANDERSON: JUDGE, I DIDN'T HAVE ANYTHING ELSE TO--

THE COURT: ALL RIGHT. I SUSTAIN THE MOTION FOR

PAT M. TANNER, OFFICIAL COURT REPORTER

Appendix E

UNITED STATES DISTRICT COURT
Northern District of Georgia

UNITED STATES OF AMERICA,
v.

Case Number: 1:95-CR-444-01-GET

JORGE DOMINGO BENDEK

Defendant

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On Or After November 1, 1987)

The Defendant, JORGE DOMINGO BENDEK, was represented by BRUCE MORRIS

The Defendant has been found not guilty on count(s) 2 and is discharged as to such count(s).
The Defendant was found guilty on count(s) 1 after a plea of not guilty. Accordingly, the Defendant is adjudged guilty of such counts involving the following offense(s).

Title & Section	Nature of the Offense	Count Numbers
21 USC 846&841(a)(1)	Conspiracy to Posses with Intend to Distribute Cocaine	

As pronounced on 11/07/96, the defendant is sentenced as provided in pages 2 through 3 of the Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

It is ordered that the defendant shall pay to the United States as special assessment of $50 for count(s) 1, which shall be due as directed by Probation.

Appendix E

It is further ordered that the defendant shall notify the United States Attorney for this district within 30 days of any change of name, residence, or mailing address until all fines, restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this ___ day of November, 1996.

Defendant's Soc. Sec. No.: 262-91-2758
Defendant's Date of Birth: 07/10/59
Defendant's address: 16755 S.W. 80th Avenue, FL 33157

24'r S (Rev, 10/90)(N.D.Ga. rev.) Sheet 2 – imprisonment

Judgment—Page 2 of 3

Defendant: JORGE DOMINGO BENDEK
Case Number: 1:95-CR-444-01 -GET

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of Prisons to be imprisoned for a term of 180 months.

The defendant is remanded to the custody of the United States Marshal.

Appendix E

RETURN

I have executed this Judgment as follows:

_____

_____

_____

___

Defendant delivered on _____ to _____

at _____,with a certified copy of this Judgment.

_____

United States Marshal

By _____

Deputy United States Marshal

AO 215 S (Rev. 10/90)(N.D.Ga. rev.) Sheet 3 - Supervised Release

Judgment—Page 3 of 3

Defendant: JORGE DOMINGO BENDEK Case Number: 1:95-CR-444-01-GET

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

Appendix E

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release,

3. The defendant shall not own or possess a firearm or destructive device.

ALLTHE STATED CONDITIONS OF SUPERVISED RELEASE AS SET FORTH IN THE PRESENTENCE REPORT ARE INCORPORATED HEREIN AND ADOPTED BY THE COURT.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.
2) The defendant shall report to the probation officer as directed by the court or probation officer
and shall submit a truthful and complete written report within the first five days of each month.
3) The defendant ' shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.
4) The defendant shall support his or her dependents and meet other family responsibilities.
5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

Appendix E

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant shall refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that maybe occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.

Appendix F

AO 245 S (Rev. 10/90)(N.D.Ga. rev.) Sheet 1 - Judgment in a Criminal Case

UNITED STATES DISTRICT COURT
Northern District of Georgia

UNITED STATES OF AMERICA

v.

Case Number: 1:95-CR-444-02-GET
ANTHONY WILLIAM CARRERAS

Defendant.

JUDGMENT IN A CRIMINAL CASE
(For Offenses Committed On or After November 1, 1987)

The defendant, ANTHONY WILLIAM CARRERAS, was represented by RONALD GAINOR.
The defendant has been found not guilty on count(s) 2 and is discharged as to such count(s).

The defendant was found guilty on count(s) 1 after a plea of not guilty. Accordingly, the defendant is adjudged guilty of such count(s), involving the following offense(s):

Title & Section	Nature of Offense	Count Number(s)
21 USC 841(a)(1)&846	Conspiracy to Possess with Intent to Distribute Cocaine.	1

As pronounced on 11/8/96, the defendant is sentenced as provided in pages 2 through number 3 of this Judgment. The sentence is imposed pursuant to the Sentencing Reform Act of 1984.

Appendix F

It is ordered that the defendant shall pay to the United States a special assessment of $50.00, for counts(s) 1, which shall be due as directed by Probation.

It is further ordered that the defendant shall notify the United States Attorney for this District within 30 days of any change of name, residence, or mailing address until all fines restitution, costs, and special assessments imposed by this Judgment are fully paid.

Signed this_____day of _____, 19____.

_s/_____
United States District Judge

Defendant's Soc. Sec. No.: 263-55-8640
Defendant's Date of Birth: 12/22/61
Defendant's address: 4904 S.W. 136 Place, Miami, FL

AO 245 S (Rev. 10/90)(N.D.Ga. rev.) Sheet 2 - Imprisonment
Judgment—Page2 of 3

Defendant: ANTHONY WILLIAM CARRERAS
Case Number: 1:95-CR-444-02-GET

IMPRISONMENT

The defendant is hereby committed to the custody of the United States Bureau of prisons to be imprisoned for a term of 168 months.

The Court makes the following recommendations to the Bureau of Prisons: The Court Recommends the defendant be confined at a facility in Southern or Middle Florida.

Appendix F

The defendant shall surrender for service of sentence at the institution designated by the Bureau of Prisons as directed by the U.S. Marshal.

RETURN

I have executed this Judgment as follows:

_____

_____

_____

___

Defendant delivered on

_____ to _____

at _____, with a certified copy of this Judgement.

_____

United States Marshal

By_s/_____

Deputy United States Marshal

AO 245 S (Rev. 10/90)(N.D. Ga. rev.) Sheet 3 - Supervised Release

Judgment—Page 3 of 3

Defendant: ANTHONY WILLIAM CARRERAS
Case Number: 1:95-CR-444-02-GET

Appendix F

SUPERVISED RELEASE

Upon release from imprisonment, the defendant shall be on supervised release for a term of 5 years.

While on supervised release, the defendant shall not commit another federal, state, or local crime; shall not illegally possess a controlled substance; shall comply with the standard conditions that have been adopted by this court (set forth below); and shall comply with the following additional conditions:

1. If ordered to the custody of the Bureau of Prisons, the defendant shall report in person to the probation office in which the defendant is released within 72 hours of release from the custody of the Bureau of Prisons.

2. If this judgment imposes a fine, special assessment, costs, or restitution obligation, it
shall be a condition of supervised release that the defendant pay any such fine, assessments, costs, and restitution that remain unpaid at the commencement of the term of supervised release.

3. The defendant shall not own or possess a firearm or destructive device.

ALL THE STATED CONDITIONS OF SUPERVISED RELEASE AS SET FORTH IN THE PRESENTENCE REPORT ARE INCORPORATED HEREIN AND ADOPTED BY THE COURT.

STANDARD CONDITIONS OF SUPERVISION

While the defendant is on supervised release pursuant to this Judgment:

1) The defendant shall not leave the judicial district without the permission of the court or probation officer.

Appendix F

2) The defendant shall report to the probation officer as directed by the court or probation officer and shall submit a truthful and complete written report within the first five days of each month.

3) The defendant shall answer truthfully all inquiries by the probation officer and follow the instructions of the probation officer.

4) The defendant shall support his or her dependents and meet other family responsibilities.

5) The defendant shall work regularly at a lawful occupation unless excused by the probation officer for schooling, training, or other acceptable reasons.

6) The defendant shall notify the probation officer within seventy-two hours of any change in residence or employment.

7) The defendant sha!1 refrain from excessive use of alcohol and shall not purchase, possess, use, distribute or administer any narcotic or other controlled substance, or any paraphernalia related to such substances.

8) The defendant shall not frequent places where controlled substances are illegally sold, used, distributed, or administered.

9) The defendant shall not associate with any persons engaged in criminal activity, and shall not associate with any person convicted of a felony unless granted permission to do so by the probation officer.

10) The defendant shall permit a probation officer to visit him or her at any time at home or elsewhere and shall permit confiscation of any contraband observed in plain view by the probation officer.

11) The defendant shall notify the probation officer within seventy-two hours of being arrested or questioned by a law enforcement officer.

12) The defendant shall not enter into any agreement to act as an informer or a special agent of a law enforcement agency without the permission of the court.

13) As directed by the probation officer, the defendant shall notify third parties of risks that maybe occasioned by the defendant's criminal record or personal history or characteristics, and shall permit the probation officer to make such notifications and to confirm the defendant's compliance with such notification requirement.